

Additional resources from the NASPA Title IX webinar on 5/14/20

**Better overall accuracy, better campus safety:
Evidence-based reasons for your college to choose
the preponderance of evidence (POE) standard,
now that we have new final Title IX regulations**

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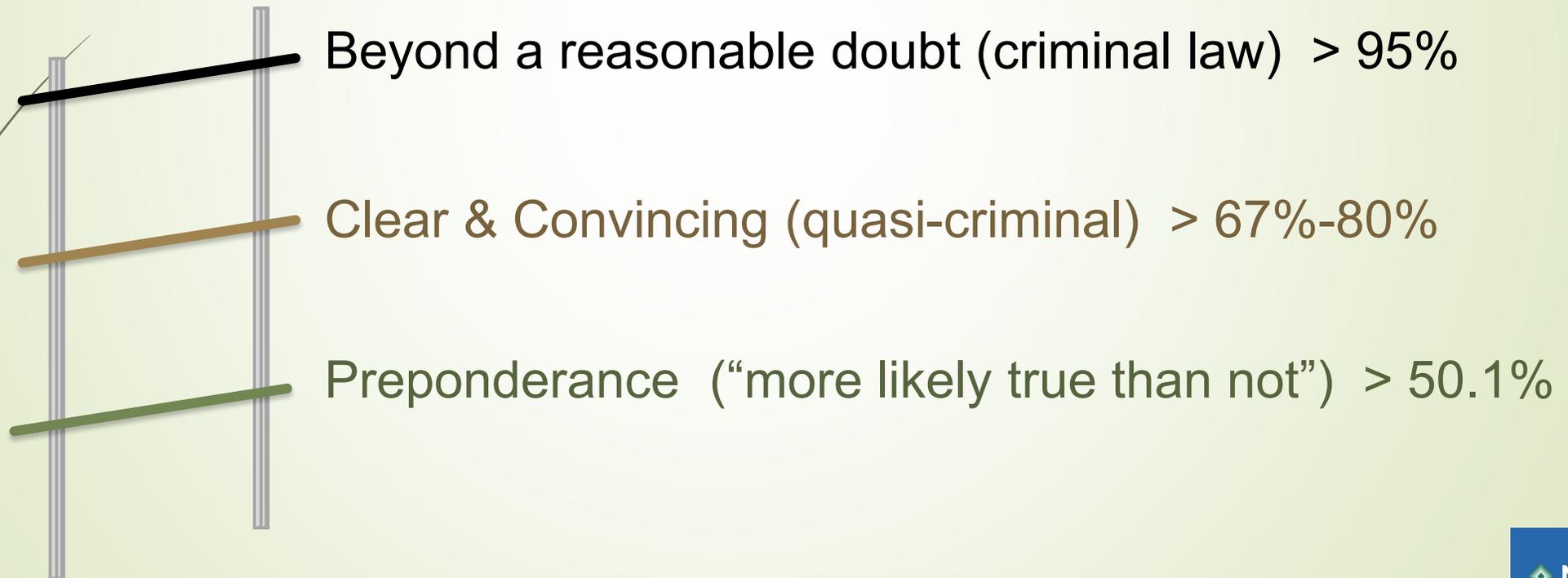
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* This presentation is based on my article “(En)forcing a Foolish Consistency?: A Critique and Comparative Analysis of the Trump Administration’s Proposed Standard of Evidence Regulation for Campus Title IX Proceedings,” 45 *[Journal of College & University Law](#)* 1-48 (2020)

It reflects my individual research views and is not intended to represent the views of the UCSC administration.

What's the standard of evidence?

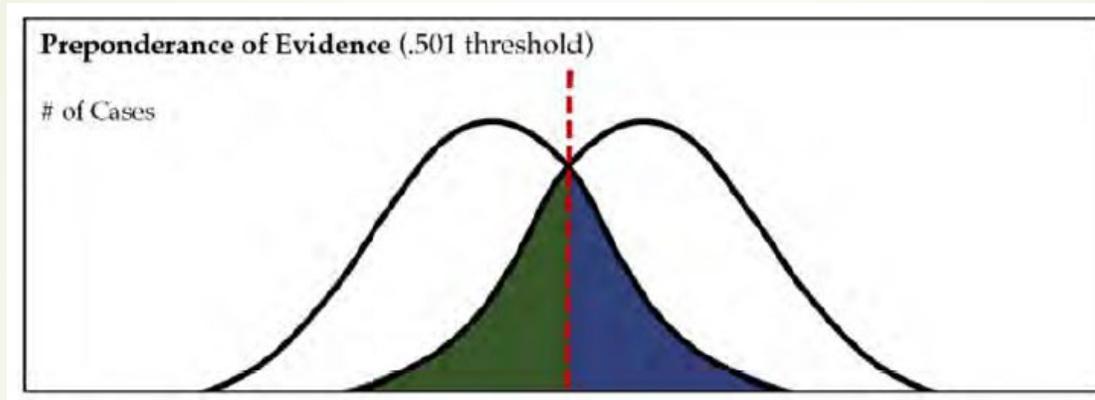
A decision rule for allocating risk in a variety of settings (can be defined qualitatively or as rough mathematical confidence levels)



POE results in better cumulative accuracy than the C&C standard (empirical model)

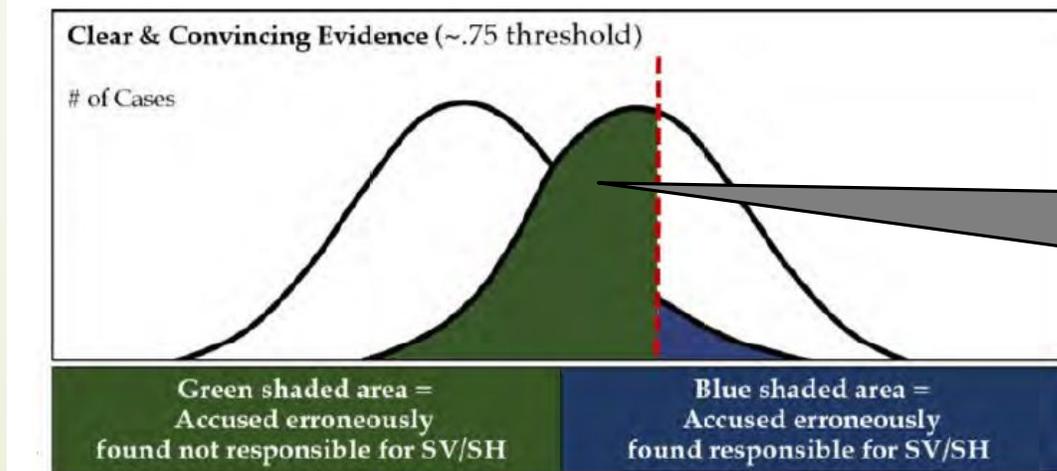
POE

False negative errors in GREEN



False positive errors in BLUE

C&C



C&C standard increases total errors, in addition to shifting more of the costs of errors to complainants

Adapted with permission from Allen et al., An Analytical Approach to Evidence (6th ed., 2016)

Strong consensus among evidence law scholars: POE results in higher cumulative accuracy

- Clermont (2018): “I accept the dominant view that the standards aim at the appropriate error distribution. In particular, the civil standard of preponderance aims at minimizing errors and error costs through the pursuit of accuracy.”
- Sherwin (2002): “Under any standard of proof, there will be a certain number of inaccurate estimates of probability...Some of the erroneous estimates of probability under a clear and convincing standard ... will now produce correct outcomes from the standpoint of truth. But the number of outcomes that fit this description will be overshadowed by the number of wrong outcomes that result from the skewed standard.”
- Sherwin (2002): “A preponderance standard produces the greatest number of correct decisions, within the limits of the court’s factfinding abilities. In contrast, a clear and convincing standard forces courts to make a set of incorrect decisions that they would not make under a preponderance standard....”).
- Clermont (2009): “Instead, requiring high confidence will greatly increase the number of false negatives, even if that strategy limits false positives; actually, low confidence, as long as the found fact is more likely than not, will minimize the expected number of errors.”

POE and consensus of evidence law scholars continued...

- Allen and Stein (2013): “The general proof requirement for civil cases—preponderance of the evidence—performs an important role in enforcing the law. Under certain conditions, this requirement allows courts to maximize the total number of correctly decided cases.... Other standards of proof are not calibrated to achieve this accuracy—maximizing and welfare-improving consequence.”
- (Kaye 1999) “The use of the more-probable-than-not standard is but one of many legal policies or procedures designed to lower the risk of factually erroneous verdicts. [T]he more-probable-than-not rule in the two-party civil case minimizes the expected number of erroneous verdicts...”
- Pardo (2009): “[T]he ‘preponderance’ rule in civil cases expresses a choice to treat parties roughly equally with regard to the risk of error and to attempt to minimize total errors. The ‘beyond a reasonable doubt’ decision rule in criminal cases—and to a lesser extent the “clear and convincing” rule in civil cases—expresses a choice to allocate more of the risk of error (or expected losses) away from defendants.”

Student affairs professionals should worry about the human costs of adopting C&C (more false neg. errors) ... Look at repeat sexual misconduct among college males

- Zinzow (2015): 68% of men who reported committing sexual coercion and assault were repeat offenders (42% were twice, 22% 3 times, 14% 4 times, 23% 5+ times)
- Swartout et al. (2015) *lower end estimate*, 27% of male college rapists committed rapes over multiple academic years
- Lisak & Miller (2002) *higher end estimate*, among college rapists 63% reported multiple rapes/attempts (average of 5.8)
- Greathouse/RAND (2015)
- Hanson & Morton-Bourgon (2005)

POE (not C&C) is used in civil rights litigation and by OCR itself

- Title IX litigation
- Title VI litigation
- Title VII litigation
- Civil cases alleging rape/sexual assault
- “Erroneous outcome” court challenges to a campus Title IX finding
- **DOE OCR Case Processing Manual §303** (Nov. 2018)... and same with earlier versions going back to the 1980s
- Other federal agencies: EPA Case Resolution Manual (2017), USDA discrimination complaints, etc...

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Where the U.S. Supreme Court requires C&C for “fundamental fairness” are very different kinds of cases (stakes/liberty) than Title IX

- **Parental rights termination** proceedings -- *Santosky v. Kramer*, 455 U.S. 745 (1982)
- **Involuntary civil (i.e., psychiatric) commitment** for an indefinite period -- *Addington v. Texas*, 441 U.S. 418 (1979)
- **Deportation** proceedings -- *Woodby v. INS*, 385 U.S. 276 (1966)
- **Ending medical life support** for a patient in a vegetative state -- *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261 (1990)

Kidder, *Journal of College & University Law* (2020)

Summary of relevant areas where C&C vs. POE standards are used

